2006

State of Utah v. Maria Joyce Jacobs : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiffs/Appellee.

Case No. 20060711 - CA

vs.

MARIA JOYCE JACOBS,

Defendant/Appellant

REPLY BRIEF OF THE APPELLANT

Appeal from a conviction for interference with arresting officer in violation of Utah Code Annotated Section 76-8-305, a class B misdemeanor, entered in the Third District Court in and for Salt Lake County, State of Utah, the Honorable Stephen L. Henriod, Judge, presiding.

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RESPONSE TO APPELLEES ARGUMENT

Point I.

THE MARSHALING REQUIREMENT IS INAPPLICABLE TO THIS APPEAL

The state erroneously contents that the appellant failed to comply with her obligation to marshal the evidence. The state's marshaling argument fails in two respects. Foremost, the issues are issues of law, reviewable for correctness, and second the issue is one of lack of evidence. The marshaling requirement applies only when challenging findings of fact. See Dishinger v. Potter, 2001 UT App. 2009, 47 P. 3d 76 at 79. Thus the appellant had no obligation to marshal evidence.

Point II

THE EXEPTION TO THE PRESERVATION REQUIREMENT HERE EXISTS TO AVOID A MANIFEST INJUSTICE

The appellant demonstrated that exceptional circumstances exist or plain error has occurred. First, the appellant had ineffective assistance of counsel and that counsel should have objected to the jury instructions that were inconsistent with the charge in the information. Second, the state entirely failed to provide any facts from which the jury could have found under proper instructions that the officer was authorized to take the appellant

in to custody and that the errors combined had the functional equivalent of a directed verdict.

Whether exceptional circumstances or plain error, the magnitude of the discrepancies in the jury instructions should have been obvious to the trial court. In State v. Holgate, 10 P.3d 346 (Utah 2000) the court examined under what circumstances it would be plain error for the trial court not to discharge a defendant on the basis of insufficient evidence and held, "Section 77-17-3 states that when the evidentiary defect is apparent to the trial court, the court shall discharge the defendant. It necessarily follows that the trial court plainly errs if it submits the case to the jury and thus fails to discharge the defendant when the evidence is apparent to the court." The court further held that "[w]hile it is difficult for the court on appeal to dictate when an evidentiary defect was apparent to the trial court, there is a certain point at which an evidentiary insufficiency is so obvious and fundamental that it would be plain error for the trial court not to discharge the defendant. An example is the case in which the state presents no evidence to support an essential element of a criminal charge. The plain error exception would serve to avoid a manifest injustice in such a case," id. at 351.

Point III.

THE APPELLANT ADEQUATLY BRIEFED THE COURT ON THE MERITS

There is no rule or law the appellant is aware of that states how many pages are required or how many citations must be made before an issue is adequately briefed. The appellant briefed every issue she raised with proper citations, cited 29 cases and sufficiently linked her citations with her arguments.

IV. THERE IS NOT A SCINTILLA OF EVIDENCE THE APPELLANT HAD COMMITTED OR WAS ABOUT TO COMMIT ANY OFFENSE, THE ARRESTING OFFICER LACKED STATUTORY AUTHORITY TO TAKE THE APPELLANT IN TO CUSTODY AND VIOLATED CLEARLY ESTABLISHED CONSTITUTIONAL PROHIBITIONS

Under both Utah State Law and the Constitution an officer must have probable cause to take a person in to custody. The state's reliance on State v. Gardiner, 814 P.2d 568 (Utah 1991), State v. Trane, 57 P.3d 1052 (Utah

2002), and State v. Pena Flores, 14 P.3d 698 (Utah App. 2000), is misplaced. Section 76-8-305 applies to a multitude of police-citizen encounters and each case must be evaluated on its own facts and circumstances. The section is not intended as a blanked prohibition so as to criminalize any conduct evincing interference where the action of the officer is not authorized by law or is not intended as a shield for police misconduct.

The foregoing cases are clearly distinguishable from the instant case. In all three cases the defendants were advised of the officer's intention to effectuate an arrest, and in all three cases the officers did have probable cause. In Gardiner the defendant physically interfered with an investigation after being informed of that intent which was based on the officers own observations of suspicious conduct. In Trane the defendant committed the act of disorderly conduct in the presence of the officers, and in Pena Flora the defendant verbally interfered in the investigation of known gang members and refused to identify himself. In the instant case the officer did not observe any criminal conduct or advised the appellant that she was a suspect.

Deputy Barnes proceeded entirely on unreliable, unverified allegations and presumptions. Presumptions and conjectures are neither facts

nor evidence. And although the appellant provided the officer voluntarily with a reasonable explanation for her action, Deputy Barnes entirely disregarded the appellants explanation and the totality of the circumstances. Most of all, the appellant was totally unaware that she was the subject of a criminal investigation.

Deputy Barnes testimony provides that although she characterized the appellant's seizure as an investigative detention, there was no actual investigation conducted. An investigative detention implies that the obtrusive act is for the purpose of investigation. Where no investigation is undertaken the detention cannot be considered investigatory and rises to the level of arrest. Significant here is also the fact that the officer not only forcefully extricated the appellant from her car, but forcefully placed her on the ground and in handcuffs.

Warrantless arrests in Utah are authorized only in limited circumstances and are governed under section 77-7-2. The section provides:

77-7-2. Arrest by peace officers.

A peace officer may make an arrest under authority of a warrant or may, without a warrant, arrest a person:

(1) for any public offense committed or attempted in the presence of any peace officer; "presence" includes all of the physical senses or any device that enhances the acuity, sensitivity, or range of any physical sense, or records the observations of any physical senses;

(2) when he has reasonable cause to believe a felony or a class A misdemeanor has been committed and has reasonable cause to believe the person arrested has committed it;

(3) when he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:

(a) flee or conceal himself to avoid arrest;

(b) destroy or conceal evidence of the commission of the offense; or

(c) injure another person or damage property belonging to another Person.

Those statutory provisions require the constitutional equivalent of probable cause. In Salt Lake City v. Smoot, 921 P.2d 1003 (Utah App. 1996) where the defendant interfered in an arrest stemming from the officers attempt to enforce a warrant, the court held that based on Terry v. Ohio, 392 U.S. 1, there are three levels of police-citizen encounters, each requiring a different degree of justification under the Fourth Amendment. The first level occurs when an officer approaches and questions a suspect. An officer may stop and

question a person at any time so long as that person is not detained against his [or her] will. The next level is reached when an officer temporarily seizes a person. In order to legally effect a temporary seizure, the officer must have articulable [reasonable] suspicion that the suspect has or is about to commit a crime, and the detention must be limited in scope. The third level is arrest which requires probable cause for the officer to believe that a crime has been or is about to be committed, id. at 1006. Smoot demonstrates the court has recognized that the strictures of the Fourth Amendment apply where a defendant is charged with interference in a detention of arrest. And in Pena Flores supra 14 P.3d at 700 the court specifically declined to address whether a person could be lawfully arrested for interfering with a level one encounter.

What should have been no more then a level one encounter in the instant case turned instead in to a full blown arrest because as the officer testified, the appellant "refuse[d] to cooperate with [her] request to exit the vehicle on her own power."

The Supreme Court has repeatedly held that when an officer without reasonable suspicion or probable cause approaches an individual, the individual has a right to ignore the police and go about his business. And any refusal to cooperate, without more, does not furnish the minimal level of

objective justification needed for a detention or seizure. See Terry supra 392 U.S. 32-33, Florida v. Royer, 460 U.S. 491,498 (1983), Florida v. Bostick, 501 U.S. 429,437 (1991), Illinois v. Wardlow, 528 U.S. 119,125 (2000), and Hibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 187 (2004).

Deputy Barnes not only lacked statutory authority to take the appellant in to custody, she also lacked statutory authority to use force. Utah law provides for the use of force as follows:

77-7-7. Force in making arrest.

If a person is being arrested and flees or forcible resists **after being informed of the intention to make the arrest**, the person arresting may use reasonable force to effect the arrest. (Emphasis added)

Deputy Barnes used force against the appellant who never attempted to escape, who was being arrested although this was not verbalized and who never verbally or physically threatened the officer with harm. Deputy Barnes has no justification for her action. A person should not have to live in fear of victimization by those sworn to protect them from crimes as well as those who live around them who commit crimes.

V. THE JURY INSTRUCTIN WERE IMPROPER

Importantly, the jury instructions contained parts of a crime of which the appellant was never charged in the information. In Cole v. Arkansas, 333 U.S. 196, 201 (1948) the Supreme Court held that "[i]t is as much of a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." In Utah it is well settled that the state may not allege a particular mode of committing an offense and then convict a defendant for having committed a different mode of that offense. See State v. Hyams, 230 P. 349,350 (Supreme Court of Utah 1924).

Although "there is no indication that the jury struggled in understanding any of the terms within the instructions" jurors may not decide legal questions nor draw conclusions of law from the facts except as guided by instructions of the court. See Coray v Southern Pa. Co.,1947, 185 P. 2d 963,certioraray granted and reversed on other grounds, 335 U.S. 520 (1949). Whether an officer was authorized to make an arrest was a question of law for the court and the court was required to charge the jury in specific

terms under what state of particular facts, when found, a detention or arrest was authorized, UCA 78-21-3.

CONCLUSION

It was the state's burden to prove the elements of the crime charged in the information and it failed to do so. The appellant was arrested based on presumptions, was prosecuted based on presumptions, and subsequently convicted by a jury required to presume what the law is. In submitting to the jury instructions without any guidance by the court on the legal issues and in including an offense not charged in the information, the jury instructions were tantamount to a directed verdict, in violation of the Due Process Clause.

The appellant respectfully hereby renews her request that this conviction be reversed.

Respectfully submitted this 12 th day of January 2007

Maria J Jacobs

Maria Joyce Jacobs

Appellant pro se

CERTIFICATE OF SERVICE

I, Maria J. Jacobs, hereby certify that I delivered eight copies of the foregoing reply brief of the appellant to the Utah Court of Appeals, 450 South State Street, 5th floor, Salt Lake City, Utah 84114-0230, and two copies to the Salt Lake County District Attorney's Office, 111 East Broadway, Suite 400, Salt Lake City, Utah 84111.

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